United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7696

To be argued by
WERNER GALLESKI

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P/S

In The

United States Court of Appeals

For The Second Circuit

KURT SCHMIEDER,

Plaintiff-Appellant,

vs.

LOUIS H. HALL, as executor of the estate of HELEN B. DWYER, deceased,

Defendant-Appellee.

On Appeal from the United States District Court, Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

WERNER GALLESKI
Attorney for Plaintiff-Appellant
450 Park Avenue
New York, New York 10022
(212) 371-9040

Of Counsel:

JAMES P. DUFFY, III
THOMAS A. ILLMENSEE
ROBERT H. REITER
RICHARD L. MEDVERD
WERNER GALLESKI

(9627)

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-against-

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BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This consolidated appeal comprises the following three appeals taken by Kurt Schmieder from the following judgments and orders of the Honorable Whitman Knapp in the United States District Court of the Southern District of New York:

(1) The judgment entered October 6, 1975, dismissing Schmieder's diversity fraud action, praying for impression of a constructive trust. The judgment denies Schmieder's standing to sue and in the alternative it dismisses the complaint in the action 69 Civ. 1939 (hereinafter called Action No. 1) on the merits. This appeal is also made from prejudgment and post-judgment orders. In this court the appeal has been docketed

under No. 75-7696.

(2) The order entered December 11, 1975, denying Schmieder's motion under Federal Rules of Civil Procedure, Rule 60 (b) for relief from the said judgment by reason of lack of due process, surprise and mistake; also from the order denying reargument of the said motion entered December 22, 1975, denying reargument of the denied motion. The District Court decided that any attempt to clarify the ambiguity (raised by Schmieder) as to what has been adjudicated would be futile but that res judicata would bar Schmieder's new proposed action for equitable fraud and windfall abuse, also that if Schmieder had doubt as to the application of res judicata, the court would suggest that Schmieder filed his proposed new complaint and asked that it be referred to Knapp, D.J. as a related case, that he would then enter an order dismissing it on grounds of res judicata and that Schmieder could then immediately appeal from that order and request the Court of Appeals to consolidate the appeals. In this court the appeal is docketed under No. 76-7038.

(3) The judgment, entered May , 1976, dismissing Schmieder's new action (76 Civ. 499, called action No. 2) which alleges a federal question claim for windfall abuse and a diversity claim for equitable fraud, on both grounds praying for impression of a constructive trust, unless the claim for damages

at law sh ll be adequate. This appeal also runs from two pre-judgment orders. It is docketed in this court under No. 76-7264.

QUESTIONS PRESENTED FOR REVIEW

(1) Did the court below err in denying Schmieder's standing to sue?

(2) Did the court below err in denying to Schmieder the ir ion of a constructive trust upon the property of Hall, Jr. as executor of the Dwyer estate?

(3) Did the court err in granting Hall Jr.'s motion to dismiss the complaint in action No. 2 on grounds of res judicata?

(4) Did the court err in denying Schmieder's motion for summary judgment in action No. 2?

FACTS

Kurt Schmieder, the plaintiff-appellant is a German national who until 1951 lived in Meerane, Saxony, Germany. In 1907 he went for a few years to USA in order to work as a selling agent for Garfield Worsted Mills at Passaic, New Jersey and then returned to Germany. At Garfield he met William Graupner (hereinafter called Graupner, in distinction from his son Herman W. Graupner), who also was employed by the same corporation, in which the Graupner and Schmieder families had an interest (54a), Louis H. Hall Sr. (hereinafter called Hall Sr.) and his law

firm were attorneys for Garfield Worsted Mills.

During World War I American property of Schmieder's family was vested by the Alien Property Custodian as enemy property. After that war, Graupner suggested to Schmieder that Hall, Sr. should handle the matter of Schmieder's claim against United States for return of the then vested Schmieder property. Hall Sr. was not retained because Schmieder or his family had already retained another lawyer (294a, E94).

Except for the years of stark inflation about 1922/3, Schmieder met Graupner every year in summer in Thuringia, Germany, where Graupner had built a summer house. In 1928 Graupner purchased $250,000 worth of securities for Schmieder. These securities were transferred to a New York Trust Company account in Schmieder's name and the legal fees incurred in the transaction were paid to Hall Sr.'s law firm (220a). Also in 1928 a power of attorney running from Schmieder to Hall Sr. and Graupner was filed with New York Trust Company.

The rise of the National Socialist Worker's party (Nazis) to governmental power in Germany occurred on January 30, 1933. The struggle of Adolf Hitler for that event, first through revolutionary rebellion and then through constitutional political maneuvering and forceful election campaigns, exploiting a deep economic crisis and severe hardship in large sectors of

the German population, commenced with the organization of the party on April 1, 1920. Hitler became a national figure while he served time upon conviction for his unsuccessful putsch in 1923. The growth of the party thereafter progressed steadily until 1931. An election success of 1930 convinced not only millions of ordinary people but many leaders in business and in the army that it would very well not be possible that Hitler could ever be stopped.

In such politico-economic climate Schmieder decided not to report his American wealth to the then Weimar republic so as to prevent that his vital foreign exchange could fall into the power of the Nazis upon their ascent to the government (59a). Schmieder was a permanent opponent to the Nazis. He was politically active as a member of the Stahlhelm, a para-military group consisting of about a million members with generally conservative principles but open to constitutionally liberal ideas. That organization was in 1934 forceably nazified with one comparatively small group thereof dissenting Schmieder requested and got his discharge on personal grounds and was from that time on spied upon and discriminated by the Nazis.

After the return of property in 1928 in view of the threatening rise of the Nazis, Schmieder discussed with Graupner his wish to diversify his risk by leaving the fund in New York but

making one third thereof legal by reporting it to the German tax authorities.

In January 1933, when the Nazis rise to power became even more imminent, Schmieder and Graupner decided to switch to safer methods for the unreported two-thirds, and caused that part of the account to be transferred into the name of Schmieder's sister-in-law Jenny Bochmann, a national and resident of Switzerland. In 1935 Schmieder and Hall Sr. met at the German summer home of Graupner. They discussed the possible formation of a corporation to hold the securities account that was then in Mrs. Bochmann's name.

Schmieder later confirmed, with a message delivered by Graupner to Hall, that he desired Hall to form the corporation.

Indeed, when William Graupner told Hall to go ahead with the plan to form a corporation, Hall apparently knew instantly and precisely what had to be done (294a).

Thereupon, Hall Sr.'s firm of Putney Twombly & Hall formed the Stoneleigh Corporation and the Hall firm ran the corporation from then on (383a). Graupner's son, Herman W. Graupner was president, Hall, Jr. was treasurer.

Cryptically, Hall Sr. testified before the Treasury Department in 1943 that he "never really acted" for Schmieder as a lawyer, but Schmieder "consulted" him as a lawyer, and that

there was some question in Hall's mind during the proceeding as to whether he should invoke the attorney-client privilege (298a, E35). Schmieder had complete trust in Hall and considered him to be the "executor" (276a, 53a).

Schmieder testified at his deposition of 1973 that Hall, Sr. took charge in forming Stoneleigh Corporation and that Schmieder considered Hall to be acting for him in setting up Stoneleigh and that Jenny Bochmann had no real interest therein (276a, 23a).

In April 1937 Jenny Bochmann declared that she no longer wanted to figure as the holder of Stoneleigh and that she wanted to sever all connections with the corporation. Since in 1937 the economic laws of Nazi Germany introduced even stronger sanctions including the death penalty for the concealment of foreign assets, Schmieder consulted with Graupner as a messenger between him and Hall to look for a new party who would continue Bochmann's role (879a). Thereupon Hall advised Schmieder through Graupner that there was no legal way for him to completely divest himself of the property unless he made an absolute gift of it with no strings attached to some other person (879a, 25a, 26a). Upon thorough consideration Schmieder agreed through Graupner and requested that he and Hall should take the necessary steps including the choice of a donee.

Initally Hall, Sr. and Graupner considered letting their sons take the property, and then alternatively, decided to give the securities to Mrs. Dwyer (E119/21).

Contrary to the finding of the court below, it was Louis Hall, Sr. who suggested Mrs. Dwyer as being the recipient of the securities (E31).

Hall, Sr. anticipated that someone might make a claim for the property after the war was over---i.e., after the "distress" of the donor had passed (E31).

Schmieder, through Graupner, requested that Hall, Sr. draw up the papers to make the gift.

Pursuant to that request Hall, Sr. worked out a whole system of documents covering up Schmieder's beneficial ownership. The fact of such ownership has been found by the court below (859a, Footnote 8), and was judicially admitted by Dwyer in her original answer (10a). There were two letters drafted by Hall, Sr., by which Bochmann posed as the donor in declaring the gift to Dwyer and to give the respective transfer instructions to Hall's firm under date of March 15, 1938.

Furthermore a paperwriting was obtained through Gaupner by which Schmieder declared: "I am in agreement with the arrangement which we have discussed by my sister-inlaw." Graupner testified later in Dwyer's District Court action that this confirmation

was exacted from Schmieder because he was parting with a large part of his fortune. The court below correctly finds that that confirmation was too ambiguous to connote anything (896a Footnote 12).

In 1939 difficulties arose with Bochmann who refused to ratify the U.S. gift tax return made on her behalf by Herman W. Graupner. Hall, Sr. went to see her in Lugano, Switzerland, in person but could not persuade her to sign that she had made a gift to Dwyer. After the war she certified to the U.S. Treasury by a legalized affidavit that she had never owned the property and that her corporation was based upon the instructions of Schmieder's attorney (E157).

There came a time in 1941 when Hall, Sr. and Dwyer were faced with the problem whether Dwyer was required to file a report on form TFR 300 of property held in the U.S.A. for a foreign blocked national. Hall, Sr. recommended the employment of a prominent outside counsel, George Z. Medalie, pursuant to whose advise she reported an absolute gift from Bochmann which became her own absolute property free of all claims of any person. A specific clause, however, continues as follows:

> "However, because the reporter was not in any relation to the donor which would permit the reporter to be aware of the motive of the donor in making the gift or of the nature of the donor's title and because the

> circumstances would permit the inference that the donor's motive was to rid herself of ownership, the reporter has deemed it appropriate to make record of the matter by filing this report" (E144/6).

Dwyer's ability to swear to Swiss nationality of the donor, on the one hand, and inability to know anything about the donor's motivation, on the other hand led to the blocking of the property in 1942 and upon investigation to its vesting as enemy property controlled by Schmieder (E 1/8).

Helen B. Dwyer was Hall Sr.'s personal secretary, typed most of his correspondence and knew Herman Graupner. It is, therefore, totally inconceivable, particularly since she was the donee of the gift, that Dwyer did not know all of the facts that were known to Hall Sr., William Graupner, and to Louis Hall, Jr., who formed Stoneleigh Corporation.

In his testimony before the court below, Hall Jr. described the duties performed by Dwyer for his father as his secretary. In addition to the usual secretarial tasks of typing and stenography, Dwyer kept records and books for Hall Sr. (323a). Hall Jr. could not recall any occasion where another secretary did work for Hall Sr. when Dwyer was available (325a).

The source of Dwyer's knowledge of the transfer of the gift property came as a result of the performance of her duties as Hall Sr.'s secretary. In her testimony before the Treasury

Department, relative to her application for the unblocking of her funds, Dwyer testified that she knew she was being considered as a recipient of the property from the letters she typed for Hall Sr. concerning the property transfer (E68). Prior to the making of the gift, and until the United States Treasury Department blocked her funds in the early 1940's, Dwyer never discussed the gift or its ramifications with anyone other than Hall Sr. (E204 #3). At the time the gift was made, Dwyer alleged that she was in poor health but due to a strong feeling of loyalty to Hall Sr., and as an expression of appreciation and gratitude for what he had done for her by way of the gift, Dwyer continued in her role as secretary to Hall Sr. and ultimately, Hall Jr. (E206/7). This expression of loyalty and appreciation, despite poor health, continued for fifteen additional years, until Dwyer's retirement, in 1953.

In 1941 or 1942, Hall Jr. was anxious to acquire property in Connecticut for the purpose of the construction of a home for himself and his family. The capital outlay for this project, $14,500, was beyond Hall Jr.'s capability at the time. In prior testimony before the New York County Surrogate and, again, before this court, Hall Jr. could not recall whether he approached Dwyer for a loan in this amount. Although he discussed the

proposed financing with his father, he did not approach either his father, a banking institution, or anyone else for these funds, because there was no necessity for him to do so. Dwyer allegedly offered the money to him (364a) without his asking.

In 1948, when Schmieder was at home between imprisonments by the Russian Secret Police and the East German communists for so-called economic sabotage, he received the visit of a Dr. Lindner, an archivar and genealogist, who was a common friend of Schmieder and Graupner. Dr. Lindner submitted for signature by Schmieder, and Schmieder did sign, a document reading as follows:

> "The undersigned confirms herewith that it is understood by him that the gift of Mrs. Bochmann's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dwyer is a voluntary, absolute and irrevocable gift, without any obligation of Mrs. Dwyer" (E220).

From shortly after the 1938 gift, Dwyer continuously made wills leaving the bulk of her estate to members of the Hall family (E152).

Hall Sr. died in 1949. Dwyer then continued as Hall Jr.'s personal secretary.

In 1951 a settlement was reached between the Attorney General and Dwyer whereunder Dwyer received a 55% return of the vested gift property.

Dwyer died in May 1970. In the then pending action No. 1 Hall Jr. as her executor was substituted for her as defendant. Her will again provided for members of the Hall family as principal beneficiaries.

ARGUMENT

POINT I

CONSOLIDATED STRUCTURE OF REMEDIES ALTERNATIVELY SOUGHT BY SCHMIEDER.

1. Damages for Actual Fraud (positive fraud, fraud and deceit). This claim is predicated upon a conspiracy to defraud, embarked upon by Hall Sr. and Dwyer. The District Court found a presumption of fraudulent intent to run against Hall Sr. as practicing attorney, but not against Dwyer. Her involvement in the operation of the law office by reason of her acceptance of the gift and its influence engendered upon Schmieder was equivalent to Hall Sr.'s. Their aggregate fiduciary involvement presumptively indicates a conspiracy to defraud Schmieder, in detail as follows:

(a) Dwyer knew that the donor was a client of her attorney-employer. In case she did not know about Schmieder's title and believed Bochmann to be the client, then, as a minimum, there was an obvious identity of client and donor in her mind.

(b) She knew that Hall Sr. acted as a dual attorney for the client-donor and herself, and she clearly consented thereto.

(c) Hall Sr. was disciplinarily prevented from so act-

ing unless he first gave Dwyer full information about the background of the gift, and unless she thereupon gave her (apart from Schmieder's) consent to Hall Sr.'s acting as dual attorney (see Kelly v. Greason (1968) Judge Breitel, 23 NY 2d 368, 378.

(d) If Dwyer, as the presumption of legality and regularity succours, had full background information, her acceptance of the gift constituted a conscious participation in her employer's practice of law with the resulting responsibilities.

On the other hand, if she failed to inquire and to reasonably investigate and blindly confided in Hall Sr.'s integrity, reducing herself to a mere tool, then a blanket responsibility flows from the recklessness of her executive role in exploiting distress of a client (under the rule of Chapman v. Rose, 1874, 56 NY 137, 141, which deals with blanket responsibility of the signor of a paper which he signed without reading it, thereby recklessly misleading and injuring others).

(e) The fraud was continued up to and beyond 1948, when Schmieder was between two prison stays in East Germany. He then was shown for signature a statement, characterizing his understanding as to a gift of Mrs. Bochmann's New York property in legalistic language (E220). The presupposition that he would, being subject to Communist censorship and police power, undergo infinite risks in confirming an American transaction, served to reconfirm and fortify the implied representations flowing from Dwyer's acceptance of the gift.

2. Damages for Constructive Fraud (equitable fraud, legal fraud). Assuming without conceding that the implications of Dwyer's acceptance of the gift and her employment of Hall Sr. as dual attorney for Schmieder and herself had innocently been brought about then Schmieder's claim for damages can be based upon constructive fraud, of which equity takes cognizance, and which does not necessarily involve any evil or corrupt intention. The factual elements, which independent of evidence of deception deliberately practiced, compose a constructive fraud; are these:

(a) Schmieder's life and property were exposed to extreme danger if the gift property and its

relation to Schmieder became know to the German Nazi Government.

(b) The absolute gift to Dwyer was prescribed by Hall Sr. as a supposed way to rescue Schmieder from that predicament.

(c) Hall Sr.'s, Hall Jr.'s and their law firm's services as dual attorneys for Schmieder and Dwyer included a cover-up of Schmieder's pre-transfer title to the gift property through false tax and foreign funds control returns, as well as the direction of Dwyer's defense and actions against the blocking and vesting of the gift property, with all the risks pertaining to such ethically and criminally unlawful practice.

(d) Hall Sr.'s asserted disciplinary freedom to act as dual attorney for Dwyer and Schmieder (in whose shoes the United States Government stood in regard to any pre-vesting interest of Schmieder in the--first blocked and then vested-gift property) can, if at all, only be defended on the ground of Schmieder's consent to Hall Sr.'s dual representation. This perpetuated Schmieder's status as a client at

least up to Dwyer's repudiation in 1967.

(e) There are no facts apt to contradict the "instinct" concept (in the language used by Judge Cardozo in Sinclair v. Purdy, 1923, 235 NY 245, 254) pursuant to which Schmieder cannot have enlisted the help of a reputable Wall Street law office for the purpose of making sure that his deprivation of the absolutely given gift property should also morally be peremptory for all times and in all future events and that, whenever the commands of the conscience of equity should call for a return of the property to him, any and all such commands should be expunged. Irresistibly, the whole transaction could only be nothing else but an "instinct" "cloaking", which for Schmieder was hallowed by his confidence in Hall Sr.'s integrity as to ethics and legality. Graupner Sr.'s letter to Hall Jr. dated June 11, 1947 (Exhibit D) defined "The transaction" as "making an absolute gift by Mrs. Bochmann after I had informed him (Schmieder) that that was the only basis on which you could act in the transaction"

(652a). Under true ethics as understood by every human being in every country, Hall Sr. should have refused to act at all if his client was to be prohibited from getting anything at any time under any circumstances out of the transaction. The fact that Hall Sr. did act in the transaction was bound to impress Schmieder to the effect that this was a legal "way-out" (so Hall Sr. quoted by Graupner at APC hearing 1943 E41) and that there was at least some chance for him to recover something on moral grounds in the far future. Schmieder's cogent notion of a satisfactory and legal solution of his problem was also nourished by the further talk which Graupner, as messenger from and to Hall, had with Schmieder (as testified to by Graupner in Dwyer's District Court action E117).

> "I had of course explained to Schmieder very clearly that Mr. Hall had emphasized that a gift must be of his own free will, absolute, and no strings attached to it; I think something like that. Those were the words in which I told Schmieder, and I told him also, if I remember correctly at that time that Mr. Hall wouldn't do anything but what the law prescribes in gifts of that kind; something like that.

> I think I spoke about Mr. Hall being connected with an old firm and so forth. Anyway he was satisfied to go ahead with the gift and I so reported to Mr. Hall."

3. Damages for Windfall Abuse through Enticement of Funds into the United States of America.

Distinct and separate from the undue influence aspects, Dwyer through Hall Sr., her and Schmieder's dual attorney, committed an independent wrongdoing when she accepted the windfall. Federal common law, as pronounced by the Supreme Court in Ex Parte Kumazo Kawato, 1942, 317 U.S. 69, provides that property which may be subject to vesting should go either to the Government or to its original owner, but not to a person holding it by chance, without having furnished any consideration therefor. Violation of that rule alone is a wrong for which Schmieder may claim damages on the ground that Dwyer's original receipt of the gift, in context with the outbreak of World War II and the partial return of the gift property to her by the Attorney General, accomplished the windfall situation opposed by federal common law.

Presently, the windfall abuse here is aggravated by the probably unprecedented specialty that here the windfall holder holds the property not by chance but by device, as a direct

consequence of the arrangement advised and executed by Hall Sr. as dual attorney for Schmieder and Dwyer with the consequent enticement of the property into (i.e., its non-removal from) the United States of America. Without such enticement, Schmieder would have used one or more other investment alternatives outside the United States of America which in any event offered a prospect to wind up with something better than a sure total loss. One otherwise plausible way out, a deal with the Nazis who notoriously paid premiums for foreign exchange and honored voluntary disclosures, was rejected by Schmieder for the sole reason that he did not want the money to be used by the Nazi war machine (59a).

Accordingly, Schmieder's within claim does not rely on a commonplace windfall ituation which has casually come into being but relates to an intentional or reckless (although not necessarily dishonest) wrong-doing as its basis for damages.

4. <u>The Remedial Right to Elect a Constructive Trust</u>.

By way of redress against each of the wrongs discussed under the foregoing headings 1 through 3, and in the absence of an adequate remedy at law, Schmieder elects the prayer for a judicial impression of a constructive trust upon the gift property if equity so requires. In the event that equity

requires otherwise, Schmieder maintains his primary claims for damages.

Although the vesting order provided for the vesting of any interest Schmieder may hold in the gift property, his entitlement to elect a constructive trust was no such interest at the time of the vesting. It was a personal right to make a remedial election with respect of substantive choices-in-action which were not vested.

The non-substantive and non-vestible nature of the unexercised remedial right to elect a constructive trust has been adjudicated by the leading cases of Melenky v. Melen, Cardozo, J., 1922, 233 NY 19 and Stoehr v. Miller, CCA 2d, 1923, 296 F 414, 425, 426. Their classical foundation is the ground-breaking article by Pound in 33 Harvard Law Review 420, which classifies the remedial application of a constructive trust into the same group as other measures under the court's judicial police powers against the parties (and not against the property as such) in order to give full and effective redress to the injured party where the remedy at law could be inadequate. Any premature freezing of the remedy would frustrate the purposes of equity.

The said choices-in-action as such are in personam, claims for actual fraud, constructive fraud and windfall abuse. They aim for damages to be paid to Schmieder out of defendant's general estate and do not constitute any interest in the gift property.

5. For Relative Ineffectiveness of the Vesting in regard to the Constructive Trust.

At the time of the settlement between Dwyer and the Attorney General, both of them were fully aware of sufficient uncontested facts compelling the conclusion that the gift was presumptively induced by undue influence. This was a good point to find a potentiality of future control by Schmieder. This clearly justified a denial of Dwyer's title claim for return of the vested property. Upon such denial of the title claim, plaintiff could have pursued his remedial right for constructive trust against the Attorney General as the benefitted party.

In spite of the primary and originary nature of the title which the Attorney General acquires by a vesting, his title still remains subject to such limitations as restrict the statute under which he vests the property (Sec. 5 Trading with the Enemy Act, 50 USC App. Sec. 5, common law as a force of

at least equal rank with the statute must therefore affect the scope of the Attorney General's title in an unprecedented litigation where in context with the operation of the United States enemy property administration the conscience of equity is aroused in favor of an impression of a constructive trust upon vested property.

To the extent that the Attorney General disregards the federal common law supporting the constructive trust, the vesting is illegal and ineffective. In Geo. Niehaus & Co. v. United States, 1957, 153 FS 428, the United States Court of Claims held a vesting order to be illegal because it violated a statute. It is respectfully submitted that the same effect must be given to a violation of federal common law. The parallel between Geo. Niehaus & Co. v. United States, supra, and the case at bar is carried further by a paramount feature of Geo. Niehaus & Co. v. United States, supra; in that case the Attorney General had ignored administrative rules, issued pursuant to statute, to the effect that property acquired be an enemy national after December 31, 1946, was not subject to vesting. In the view of the Court of Claims that administrative step amounted to an "invitation", addressed to former enemies, to bring property into this country and the claimant was held

entitled to be treated in a way honoring the "invitation". His title was held not to have been lost by such illegal vesting. Likewise, Schmieder's enticement into the United States enemy property jurisdiction through undue influence and windfall abuse had the effect of an "invitation", exposing Schmieder's property to vesting under circumstances in which the property would without the enticement have been outside the United States during World War II. His common law remedy must therefore equally prevail over the vesting. It is true that, in the instant case, the "invitation" did not issue from the Government. But that distinction is more than compensated for. To Schmieder, the "invitation" emanated from officers of the court who, in the light of Schmieder's distress, exerted a massive and irresistible influence upon him.

Consequently, the vesting order could not validly exonerate the Attorney General from Schmieder's common law remedy for a constructive trust to be impressed upon the vested property. Either the vesting order must be construed not to purport such exoneration, or else it is, to the extent that it so purports, relatively null and void toward Schmieder in that respect.

6. In the Alternative, for Automatic Divesting of Schmieder's Interest in this Litigation as of January 1, 1962 under USC App. Sec. 41.

An alternative ground for Schmieder's freedom under trading-with-the-enemy aspects to pursue his remedy for a constructive trust springs from the conditional basis upon which the Government claims it from Schmieder, but not from the Dwyer Estate, qualifying its claim against Schmieder as contingent upon Schmieder's first recovering against Dwyer. This means that whatever Schmieder may recover from the Dwyer Estate is not yet deliverable to the Government and brings Schmieder's remedial right for a constructive trust into the class of interests in an estate, trust or remainder, which had neither become payable or deliverable to nor had vested in possession of the Attorney General prior to December 31, 1961. Any "equity" which Schmieder could have had at the effective date of the Vesting Order in the gift property by way of his unexercised remedial right was not vested in possession either at the time of the Vesting Order (December 15, 1948) or on December 31, 1961. Until 1967, Dwyer had not repudiated anything and Schmieder had not invoked the conscience of equity as yet. The unexercised remedial right was therefore divested as of December 31, 1961, on the applicable ground that Dwyer's absolute title constituted

a precedent estate upon which the constructive trust would follow as soon as the conscience of equity would be aroused.

The Government rejects Schmieder's argument of automatic divesting (832a-836a, 840a-841a) without supplying any counter-argument except that, in its view, plaintiff "has misinterpreted and misapplied the provisions of 50 USC App. paragraph 41" (863a).

7. In the Alternative for Lifting of the Contingent Remainder Imposed by the Suggestion of the United States upon such Part of the Property in Issue in this Suit as Schmieder may Recover (765a-772a).

Arguing on the contested basis that any of Schmieder's claims as aforesaid has been effectively vested and also subsequently remained eliminated by the vesting order of 1948, as amended, and that there was no automatic divesting of the respective "equities" by virtue of their qualification as contingent remainder, then, upon the basis of those two assumptions, Schmieder makes claim that the property now held by the Dwyer estate is in a legal sense not the property which was vested in 1949, and that imposition thereon of a new contingent remainder in favor of the Attorney General constitutes a new vesting. This is a claim for return of vested property under 50 USC App. Sec. 9 and is raised by Schmieder's Answer to

Intervention by the United States (782a, 788a, 789a).

The non-identity of the property presently held by the Dwyer estate with the property vested in 1948, stems from the fact that Dwyer received the property not, as the court below held, in the course of an exercise of the managing powers of the Attorney General as common law trustee pursuant to 50 USC App. Sec. 12. Such a distribution by the Attorney General as common law trustee would have required a partial recognition of validity of Dwyer's title claim. Any such recognition was however expressly and specifically withheld. The settlement stipulation rather provides for a dismissal of the title claim of Dwyer's action for return of vested property with prejudice, Exhibit 13 (E15, 18):

> "Upon the delivery of the securities and the making of the payments herein specified, plaintiff will cause the above-entitled action to be dismissed with prejudice and the appropriate notice to the defendant to that effect."

What really happened was this: upon adjudication of the title claim as totally unfounded, and upon the final winding up of the respective APC-account, the United States became the owner of the property as beneficiary of the balance in the APC-account. The settlement can therefore only be

understood to have been made between a beneficiary to the fund in question and a title claimant to the fund in question but not between a title claimant and the fiduciary of the fund.

The stipulation was a deal by which the United States and Dwyer exchanged Dwyer's cooperation in the dismissal of her title claim with prejudice against delivery by the United States as beneficiary of part of the fund to her. This type of transaction is legally on the same level as any other sale or transaction against consideration which the beneficiary engages in after he has received distribution. Such transaction is entirely independent from matters affecting the administration of the fund, and the property is fully disassociated from matters relating to such administration. Administration wise, the full dismissal of the title claim stands undisturbed. Consequently, the United States' delivery of the property to Dwyer against the consideration which the United States bargained for. From Dwyer's point of view, she gave up part of her title claim and conceded a dismissal with prejudice against partial delivery of the property claimed by her. Such bargain does not leave any room for an undeclared reservation of rights by the United States.

While the returned property was taken by Dwyer against good and complete consideration flowing to the United States, Dwyer sustained the consideration expended by her, namely her partial abandonment of her title claim, entirely out of the gift property with the effect that the property returned to her by the Attorney General, by way of surrogation, is subject to the constructive trust for Schmieder, without however in the legal sense being part of the vested property.

On the other hand, if it were held that Dwyer received the partial return of the vested property from the Attorney General in his capacity as common law trustee administering the fund, in which capacity he fought against Dwyer's title claim, then she would have been protected if she had been a purchaser for value. "Here, however, Mrs. Dwyer was at all times a donee and not a purchaser." So Bonsal, D.J. in Action No. 1 below, (1971, Endorsement denying Hall Jr.'s second motion for summary judgment (763a).)

Thus, under every possible interpretation of the settlement, Schmieder's claim for a constructive trust is not affected by any prior vesting. The suggestion of the United States, which suggests the contrary and pronounces the existence or

imposition, respectively, of a contingent remainder in favor of the United States encumbering any recovery by Schmieder of any part of the property herein, therefore constitutes a new vesting. Now being an alien friend, Schmieder under 50 USC App. Sec. 9 (a) cross-claims that such a new vesting is unlawful and that the purportedly resulting encumbrance should be lifted.

POINT II

SCHMIEDER HAS STANDING TO SUE.

The court below erred in holding that the constructive trust sought by Schmieder in Action No. 1 was a vestible interest in the gift property in 1949 (883a-886a). This holding is erroneous since the remedial right for a constructive trust does not have any existence unless it is remedially exercised. Before that time, it is unvestible as set forth under A6 hereinabove.

The court below erred in holding that the scope of the vesting order herein as amended (E1-8), was, as far as debts owed to Schmieder were concerned, not limited to the specific assets which constitute "the property described above" in the dispositive vesting clause (E2 and 4). The District Court drew its conclusion from an emphasized part of page 2 (884a) of the vesting order by which the Attorney General made the factual finding that the gift property was "held on behalf of or on account of" Schmieder. This seems to have led the District Court to hold that all claims of Schmieder relating to his deprivation of the property were covered by the vesting. The said fact-finding however has no effect upon the definition of what is vested but only upon the ground why it is vested. Schmieder's claims are not part of the gift property (which

alone is covered by the dispositive vesting clause) and have not otherwise been vested.

The court below erred in holding that "the claim that the government settled when it reconveyed certain property back to Mrs. Dwyer was a claim that Schmieder retained some beneficial interest" (887/8a). The subject matter of the settlement rather was more generally whether the finding in the vesting order that the property was "owned or controlled by....Schmieder" was or was not correct. The present case is a typical instance for the distinction. Although Schmieder had no vestible interest in the property, his claims and the obvious undue influence background justified a finding of control by Schmieder. While Schmieder contests any effect of the vesting order against him on other grounds, he finds no error in the finding of control. What he opposes is the court's finding that "the very interest Schmieder asserts in this action is the one which was subject to the vesting order and was ultimately disposed of in its settlement with Mr. Dwyer" (885a/886a) and any supposed justification for the partial return to Dwyer, as more fully noted hereinabove under A5. It is only because the partial return now is an accomplished fact that he directs his remedial plea for a constructive trust to the returned property.

Finally, apart from any and all technical reasonings,

Schmieder urges that the broadly equitable foundation of his claims must in any event give him access to the courts of this country because, even if Schmieder were still to be deemed to be an alien enemy with respect of the gift property, the common law denies access to United States courts as plaintiffs to non-resident alien enemies merely where aid and comfort would thereby be given to the enemy. See Japanese Government v. Commercial Cas. Ins. Co., DCNYSD, Ryan, J., 101 FS 243, 248 (1951) about specific situations which "must be respected and enforced in our courts". There is no statutory provision closing the United States courts to Schmieder. Neither can the disposition of this case afford comfort to any enemy in any past or future war. All Schmieder wants is an adjudication of equities as they appear under United States law, with the United States interest being the controlling factor. The publicly relevant issue of this case is whether the integrity and efficiency of the enemy property administration is better served by draconic penalization of at most technical violators of the law or by accentuation of the aim that pernicious sabotage from within by persons executively engaged, as attorney or employee, in the practice of law to their own benefit must be eradicated.

POINT III

SCHMIEDER IS REMEDIALLY ENTITLED TO THE CONSTRUCTIVE TRUST.

The court below erred in holding "that there was no . . . gentlemen's agreement, and that the gift to Mrs. Dwyer was, in fact, unconditional and absolute" (E876/7a). Schmieder has no quarrel with the holding that the gift was unconditional and absolute. But the undue influence background, which is "instinctly" tantamount to an implied gentlemen's agreement in the non-contractual sense, is fully consistent with a transfer of absolute title from Schmieder to Dwyer.

The transfer was not a common law gift because there was no donative intent. Still, it was an absolute transfer coming under the definition of a gift in the Revenue Act. 1932, Secs. 501, 503, 26 USCA Internal Revenue Code Secs. 1000, 1002, also under Treasury Regulation 79 (1936 ed.) Art. 1 according to which the imposition of a gift "tax is not limited . . . to transfers . . . without valuable consideration, which at common law are treated as gifts . . . ." See Commissioner of Internal Revenue v. Wemyss, Frankfurter, J., 324 US 303 (1945).

Potentiality of future contemplations of morality does not effect the absoluteness of a title to property.

The court below also erred in finding that Schmieder did not enclose any alternative of what he would have done if the gift to Dwyer had not occurred. This is an obvious oversight. Schmieder clearly mentioned other foreign countries within his contemplation and also the possibility though politically disgusting to him, of making a deal with the Nazis on the basis of voluntary disclosure against amnesty (59a).

The record also is bare of any proof that Schmieder was advised by anybody that all future contemplations as to the morality of a return of the property were to be outlawed or otherwise excluded (to whatever extent such exclusion might be effective under public policy). The only participant who injects a factor of morality into the 1938 "transaction" is Hall Jr. According to him, the only thing that the person made the gift "could do would be to make an outright gift . . . with no strings attached and <u>with no understanding</u>, legally, <u>morally</u> or otherwise" (emphasis supplied, 1022a). But even Hall, Jr. does not claim that such term was communicated to Schmieder.

The court below erred in terming Schmieder's 1948 statement (E220) "a crucial piece of evidence". In fact, however, that statement only restated the uncontested red thread pervading the whole record herein, viz., that the gift was absolute

and that Dwyer was to be under no obligation. The statement embodied all the ambiguities whose resolution could at least have had a possible relevance to the settlement of Dwyer's D.C. action, such as who was the donor (the statement just refers to a gift of Bochmann's balances and securities); whether or not there was donative intent; and whether or not moral contemplations were excluded. In the form actually used, the statement was in any event too indefinite to be incorrect and left as to the moral issue a no man's land open. If any criminal fraud was in effect committed by the playing of that statement into the hands of the U.S. Military Government as an exhibit to an interview of Rolf Schmieder, Schmieder's son (E180), then the criminal responsibility can only lie with the instigators of that feat. There is not the slightest basis to denigrate Schmieder's character or to find unclean hands of his on that score.

The same applies to the issue of evasion of German taxes which was unavoidable in the course of Schmieder's political fight against the Nazis. The court below erred when it opened that the Nazi threat still was far off in 1929 when the question of tax treatment of Schmieder's property first became practical.

An equitable basis for the remedial imposition of the constructive trust also arises in the event that no conspiracy

between Hall Sr. and no professional equitable disablement of Dwyer toward Schmieder should be held to have been shown under the principles of Ogden v. Gardner, 22 NY 327 (1860) and Poillon v. Martin, 1 Sand. Ch.R.569, subjecting executively involved employees to the equitable disability of their employer-fiduciaries. In any event, Dwyer was a beneficiary without consideration from her appointment as donee by Hall Sr. pursuant to Schmieder's power. Dwyer thus benefited as gratuitous transferee from Schmieder's giving to Hall Sr. the power to appoint a donee. This subjects Dwyer and her estate to the constructive trust, regardless of whether or not Dwyer had notice of the fraud. The time-honored rule, established by Bridgeman v. Green, Wilmont, J., 2 Ves. Sr. 567, Wilm. 58, 65 (1755) reads:

> "Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it."

POINT IV

THE ORDER 1078-82a) GRANTING HALL JR.'S MOTION TO DISMISS COMPLAINT IN ACTION NO. 2 ON GROUNDS OF RES JUDICATA IS AN ORDER GRANTING SUMMARY JUDGMENT.

Hall Jr.'s motion for judgment dismissing the complaint in Action No. 2 on grounds of res judicata pursuant to Federal Rules of Civil Procedure, Rule 12 (b)(6) or in the alternative, summary judgment dismissing the said complaint, pursuant to Rule 56 dated February 17, 1976 (1029/30a) was supported by affidavit (1031/3a) and purported to raise or resolve factual issues connected with prerequisites of res judicata.

Pursuant to Rule 12(b)(6) the motion must therefore be treated as motion for summary judgment and the order dated March 12. 1976, (1078/82a) as order for summary judgment.

POINT V

UPON HALL JR.'s MOTION ON GROUNDS OF RES JUDICATA SUMMARY JUDGMENT SHOULD HAVE BEEN AWARDED TO SCHMIEDER.

The motion failed to specify any grounds for claim preclusion/ res judicata. It conceded (1041a) that a cause of action does not consist of facts but of the unlawful violation of the right which the facts show. The complaint in the Action No. 2 comprises a federal claim for windfall abuse. The violation

relied upon is based on federal law and involves the relationship between the wronqdoer and the United States. Consequently, there is no identity of claims.

Neither did Hall Jr. controvert the various factual issues which Schmieder raised against issue preclusion/res judicata sometimes called collateral estoppel, such as the defenses of excusable and reasonable doubt on Schmieder's part as to the meaning as to what was decided in Action No. 2 (1048a), and of lack of incentive to litigate and to focus on the No. 2 claim in No. 1, whereby Schmieder was deprived of his in court, details having been raised by Schmieder's post-trial motions grounded on lack of incentive to litigate and to focus on the No. 2 claim in No. 1, whereby Schmieder was deprived of his day in court, details

Summary judgment for Schmieder is in order because Hall Jr. failed to controvert the complaint and the other basic matters upon which under part I through III hereof Schmieder's claim should be granted.

POINT VI

SCHMIEDER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

Schmieder's motion (1083/4a) for summary judgment dated April 20, 1976 was denied by endorsed order of Inzer B. Wyatt, D.J., entered May 5, 1976 (1128a). The return date of the motion had been set for May 7, 1976. The motion remained uncontroverted by Hall Jr. Schmieder submits that for the purposes of the motion, all factual matters stated by Schmieder must be deemed to be true. The matters set forth in Schmieder's statement under local rule 9(g) warrant an award of summary judgment to him on the grounds set forth under the headings I through III herein. On the basis thereof, summary judgment should have been granted for Schmieder.

POINT VII

DISPOSITION SOUGHT

(1) Re Appeal docketed under No. 75-7696.

Appellant Schmieder seeks reversal of the judgment below in Action No. 1 and judgment for appellant awarding the constructive trust and directing the appellee Louis H. Hall Jr. to account thereon. In the event that damages at law shall be held adequate, judgment is sought for damages.

(2) Re Appeal docketed under No. 76-7038.

Appellant Schmieder prays that this appeal now be pronounced moot. It now overlaps with the other two appeals herein.

(3) Re Appeal docketed under No. 76-7264.

Appellant Schmieder seeks reversal of the judgment below in Action No. 2 and summary judgment awarding to appellee the relief and alternative relief specified under (1) hereof concerning the appeal docketed under No. 75-7696.

Respectfully submitted,

Werner Galleski
Attorney for Plaintiff-Appellant

Of Counsel
James P. Duffy III
Thomas A. Illmensee
Robert H. Reiter
Richard L. Medverd
Werner Galleski

AFFIDAVIT OF SERVICE

Re: 75-7696
Schmieder v. Hall

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Plaintiff-Appellant .

That on the 21st day of June , 1976, I served the within Brief for Plaintiff-Appellant in the matter of Kurt Schmieder v. Louis H. Hall ,

upon Martin, Obermaier & Morvillo, Esqs., 1290 Avenue of Americas, New York, New York 10019 and Turchin & Topper, Esqs. 60 East 42nd Street, New York, New York 10017

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed before me this 21st day of June 1976.

Lorraine Leotta
A Notary Public of the State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977